

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LANETTE HERNANDEZ

Claimant

VS.

EXCEL CORPORATION

Self-Insured Respondent

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Docket No. 1,011,565

ORDER

Claimant requested review of the March 3, 2005 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on July 27, 2005.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed the claimant suffered a work-related injury on May 14, 2003. The issues for determination by the ALJ included the nature and extent of disability and the claimant's average gross weekly wage. The ALJ determined that because claimant was terminated for excessive absenteeism her award should be limited to her functional impairment. Stated another way, the ALJ determined the claimant failed to demonstrate a good faith effort to retain employment paying a comparable wage. Consequently, the ALJ limited claimant's award to a 4 percent permanent partial functional impairment. The ALJ further determined that claimant's average gross weekly wage was \$443.40.

The claimant requested review and argues the ALJ failed to include the additional compensation claimant received as holiday pay in the calculation of the average weekly wage. And claimant argues the ALJ should have calculated the weekly benefits for overtime, shift differential and holiday pay by using 20 weeks as the divisor instead of 21.

Claimant further argues that one of the absences used in the determination that she would be terminated for excessive absenteeism was because of her work-related injuries and respondent's failure to provide medical treatment left claimant with no option but to leave work. Consequently, she argues respondent exhibited bad faith in terminating her employment and she is entitled to a work disability. Claimant argues she suffered an 87.5 percent work disability until she became employed at Trinity Manor and then she would be entitled to a 59 percent work disability after becoming employed at Trinity Manor.

The respondent argues claimant was terminated for reasons unrelated to her accident and, accordingly, is not entitled to a work disability. Respondent further argues the ALJ's Award should be modified to deny claimant permanent partial disability compensation as she failed to meet her burden of proof that she suffered any permanent impairment as a result of her work-related accident. In the alternative, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award contains a detailed recitation of the record and it is not necessary to repeat those facts herein. The Board adopts the findings of fact made by the ALJ that are not inconsistent with the findings and conclusions stated in this Order.

The Kansas Appellate Courts, beginning with *Foulk*¹, have barred a claimant from receiving work disability benefits if the claimant is offered an accommodated job paying 90 percent or more of her pre-injury wage and is capable of performing the job within her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.² Before claimant can claim entitlement to work disability benefits, she must first establish that she made a good faith effort to obtain or retain appropriate employment.³

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.⁴ In this case, claimant was terminated for violating respondent's policy regarding excessive absences from work.

Before claimant went to the respondent's nurses station in March 2003 with her first and only complaints of hand pain she had already begun to accumulate absences from work in violation of respondent's work attendance policy. And she had received a written warning February 21, 2003, regarding her excessive absences.⁵ The absences from work continued and claimant received a second written warning on April 1, 2003.⁶ The claimant continued to accumulate absences from work and was terminated on May 14, 2003, for violation of respondent's attendance policy.

The claimant was questioned regarding the reasons why she missed work. On some dates she could not recall the reason; on other dates noted her absence was for personal reasons; she was jailed; she had to pick up her son who had been suspended from school; she took her daughter to the hospital and had to care for her daughter's child. The last date she missed work she had called in and indicated she would be absent for personal business reasons. Although claimant later testified this last absence was because her hands were hurting she admitted she did not tell respondent that this absence was because of her work-related injury.

The Board finds the record fails to establish the termination was made because of claimant's work-related injuries or in bad faith. It is initially claimant's burden to prove that she has made a good faith effort to retain appropriate employment. In this case, the ALJ concluded claimant's termination was the result of her excessive absences from work which were unrelated to her injury. The claimant's failure to show up for work exhibited a failure to conduct herself in an appropriate fashion to retain her employment and demonstrated a lack of good faith which resulted in claimant being limited to her functional impairment. The Board agrees.

⁴ See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App.2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

⁵ Hernandez Depo., Resp. Ex. 5.

⁶ *Id.*, Resp. Ex. 6.

Claimant argues the ALJ did not correctly calculate the average gross weekly wage. The Board disagrees and affirms the ALJ's determination that claimant's average gross weekly wage was \$443.40.

K.S.A. 44-511 defines average weekly wage for an hourly employee who customarily works 40 hours per week to include a base pay of 40 times the hourly rate plus the average weekly overtime plus any "additional compensation" as that phrase is defined. Additional compensation does not include holiday or vacation pay.

At the time of the injury in this claim, claimant was a full-time employee and earning \$10.50 per hour plus overtime and shift differential compensation. Based on the wage statement attached as Exhibit No. 7 to the claimant's deposition, claimant earned a total of \$424.22 or \$20.20 per week in overtime during the 21 weeks claimant was employed before the accident. Because the wage statement shows claimant was paid for 21 weeks of employment with respondent, the ALJ correctly used that number of weeks in determining the average weekly overtime and shift differential.⁷ Exhibit No. 7 also shows shift differential pay and additional night overtime differential which totals \$67.11 or \$3.20 per week. Combining the base weekly wage of \$420 plus the \$20.20 per week in overtime and the \$3.20 per week in shift differential results in an average gross weekly wage of \$443.40.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 3, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁷ See K.S.A. 2003 Supp. 44-511(b)(4)(B)(iii).

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director